

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10
11 RICHARD BREES,

12 Plaintiff,

13 v.

14 HMS GLOBAL MARITIME INC, et al.,

15 Defendants.

CASE NO. 3:18-cv-05691-RJB

ORDER ON PLAINTIFF'S
MOTION TO COMPEL
DISCOVERY

16 THIS MATTER comes before the Court on Plaintiff's Motion to Compel Discovery. Dkt.
17 85. The Court is familiar with the record and all materials filed in support of and in opposition to
18 the motion, and it is fully advised. For the reasons set forth below, the Court should deny
19 Plaintiff's Motion to Compel Discovery (Dkt. 85).

20 **I. BACKGROUND & PROCEDURAL HISTORY**

21 **A. BACKGROUND**

22 On July 3, 2019, Defendant Thomas Ripa ("Mr. Ripa"), an employee of HMS Ferries Inc.
23 and/or HMS Global Maritime Inc., responded to Plaintiff's First Set of Interrogatories and
24 Requests for Production. Dkt. 100. Interrogatory No. 6 asked Mr. Ripa, "At any time, have you

1 spoken with Steve Caputo, or the law offices of Harrigan Leyh Farmer Thomsen LLP regarding
2 your witness statement? If so, please describe the/those conversation(s).” Dkt. 100, at 2. Mr.

3 Ripa objected and responded as follows:

4 Subject to and without waiving any objection, Steven Caputo
5 requested I write a statement regarding the events I witnessed on
6 May 18, 2018 involving the plaintiff and I discussed the events
7 described in my statement with Michelle Buhler and Charles
8 Jordan. []Subject to and without waiving any objection, a 6/27/18
9 email from Steve Caputo to Thomas Ripa is an associated
10 document.”

11 Dkt. 100, at 2.

12 On July 17, 2019, Plaintiff served a request for production on Mr. Ripa for “[a]n email
13 dated 6/27/18 from Steven Caputo to Thomas Ripa, otherwise described in Mr. Ripa’s
14 interrogatory response as an ‘associated document.’” Dkt. 100, at 2. Mr. Ripa objected to
15 producing the email insofar as it also contained a January 26, 2019 email between Mr. Ripa and
16 associate counsel for HMS Global Maritime, Justin Walker (“Mr. Walker”). Dkt. 100, at 2. Mr.
17 Ripa produced the email in redacted form with a privilege log. Dkts. 85, at 7; and 100, at 2, 12–
18 13. Mr. Ripa claimed that the email between he and Mr. Walker was redacted “not only because
19 it was not the subject of plaintiff’s discovery request, but also because it was protected from
20 disclosure pursuant to the attorney-client privilege and the work product doctrine, as per the
21 privilege log produced with the document.” Dkt. 100, at 2–3.

22 The parties met and conferred and apparently agreed to partially unredact the email only
23 as to the date of the email and the identities of Mr. Walker and Mr. Ripa. Dkt. 100, at 3. The
24 parties disagree as to whether they ever agreed to produce the email fully unredacted. Dkt. 100,
25 at 3.

1 The partially unredacted email on file shows a June 27, 2018 email correspondence from
2 Steve Caputo to Mr. Ripa with the following message: “I won’t have the date until tomorrow.
3 The statement can wait until then. Please let Dom know. []Thanks,[] Steven Caputo.” Dkt. 100,
4 at 12. The email shows that it was sent from Mr. Ripa to Mr. Walker on January 25, 2019, and
5 several lines of text are redacted, including, apparently, Steven Caputo’s cell phone number. Dkt.
6 100, at 23. The attached privilege log refers to the email, which is described as “[e]mail re:
7 5/18/18 witness statement” and “privilege[d]” as “[w]ork product, attorney-client.” Dkt. 100, at
8 15 (emphasis removed).

9 **B. PROCEDURAL HISTORY**

10 Plaintiff filed the instant Motion to Compel Discovery. Dkt. 85. Defendants HMS Global
11 Maritime Inc., HMS Ferries Inc., Steve Caputo, Dominick De Lango, Mylinda Miller, Thomas
12 Ripa Tara Reynolds, and Derick F. Leenstra (collectively “HMS Defendants”) filed an
13 oppositional response. Dkt. 99. Plaintiff filed a reply in support of the motion. Dkt. 105. The
14 motion was renoted for consideration on November 1, 2019. Dkt. 108.

15 **II. DISCUSSION**

16 **A. STANDARD ON DISCOVERY GENERALLY**

17 Fed. R. Civ. P. 26 (b)(1) provides:

18 Unless otherwise limited by court order, the scope of discovery is
19 as follows: Parties may obtain discovery regarding any
20 nonprivileged matter that is relevant to any party's claim or defense
21 and proportional to the needs of the case, considering the
22 importance of the issues at stake in the action, the amount in
23 controversy, the parties' relative access to relevant information, the
24 parties' resources, the importance of the discovery in resolving the
issues, and whether the burden or expense of the proposed
discovery outweighs its likely benefit. Information within this
scope of discovery need not be admissible in evidence to be
discoverable.

1 “The court should and ordinarily does interpret ‘relevant’ very broadly to mean matter that is
2 relevant to anything that is or may become an issue in the litigation.” *Oppenheimer Fund, Inc. v.*
3 *Sanders*, 437 U.S. 340, 351, n.12 (1978) (*quoting* 4 J. Moore, Federal Practice ¶ 26.56 [1], p. 26-
4 131 n. 34 (2d ed. 1976)).

5 **B. STANDARDS FOR ATTORNEY CLIENT PRIVILEGE, WORK-PRODUCT**
6 **DOCTRINE, AND MOTION TO COMPEL**

7 Where, as here, there are federal question claims and pendent state law claims, federal
8 common law governs claims of privilege. *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th
9 Cir. 2005); Fed. R. Evidence 501.

10 1. Attorney-Client Privilege Standard

11 “The attorney-client privilege protects confidential communications between attorneys
12 and clients, which are made for the purpose of giving legal advice.” *United States v. Richey*, 632
13 F.3d 559, 566 (9th Cir. 2011). The privilege exists where:

14 (1) legal advice of any kind is sought (2) from a professional legal
15 adviser in his capacity as such, (3) the communications relating to
16 that purpose, (4) made in confidence (5) by the client, (6) are at his
17 instance permanently protected (7) from disclosure by himself or
18 by the legal adviser, (8) unless the protection be waived.

19 *Id.*

20 The party asserting the “privilege has the burden of establishing the relationship and
21 privileged nature of the communication.” *Id.*

22 The purpose of the attorney-client privilege is to “encourage full and frank
23 communication between attorneys and their clients.” *Upjohn Co. v. United States*, 449 U.S. 383,
24 389 (1981). “[T]he *Upjohn* Court held that the attorney-client privilege extended to
communications with counsel made by all employees, not just upper-echelon management,
concerning matters within the scope of their respective corporate duties, supplied for the purpose

1 of the corporation obtaining legal advice, and treated in a confidential manner.” *Davis v. City of*
2 *Seattle*, No. C06-1659Z, 2007 WL 4166154, at *3 (W.D. Wash. Nov. 20, 2007).

3 “[C]ommunications between employees of a subsidiary corporation and counsel for the parent
4 corporation . . . [are] privileged if the employee possesses information critical to the
5 representation of the parent company and the communications concern matters within the scope
6 of employment.” *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1494
7 n.6 (9th Cir. 1989).

8 2. Work-Product Standard

9 “The work-product doctrine protects from discovery documents and tangible things
10 prepared by a party or his representative in anticipation of litigation.” *Richey*, at 567 (internal
11 quotation marks and citation omitted). “To qualify for work-product protection, documents
12 must: (1) be prepared in anticipation of litigation or for trial and (2) be prepared by or for another
13 party or by or for that other party’s representative.” *Id.* “The work-product doctrine’s
14 protections are waivable.” *Id.*

15 “The work-product rule is not a privilege but a qualified immunity protecting from
16 discovery documents and tangible things prepared by a party or his representative in anticipation
17 of litigation.” *Admiral Ins. Co.*, 881 F.2d at 1494.

18 The principal difference between the attorney-client privilege and
19 the work product doctrine, in terms of the protections each
20 provides, is that the privilege cannot be overcome by a showing of
need, whereas a showing of need may justify discovery of an
attorney's work product.

21 *Id.* Under Rule 26(b)(3)(A), “ordinarily, a party may not discover documents . . . that are
22 prepared in anticipation of litigation,” but those materials may be discoverable if the party
23 seeking them “shows that it has substantial need for the materials to prepare its case and cannot,
24

1 without undue hardship, obtain their substantial equivalent by other means.” The Rule
2 continues, providing that “[i]f the court orders discovery of those materials, it must protect
3 against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s
4 attorney.” Rule 26(b)(3)(B).

5 3. Motion to Compel Standard

6 Rule 37(a)(1) provides:

7 On notice to other parties and all affected persons, a party may
8 move for an order compelling disclosure or discovery. The motion
9 must include a certification that the movant has in good faith
10 conferred or attempted to confer with the person or party failing to
11 make disclosure or discovery in an effort to obtain it without court
12 action.

11 4. Meet and Confer Requirements

12 Plaintiff has certified that the parties met and conferred but were unable to resolve this
13 dispute. Dkt. 85, at 1. Therefore, Plaintiff’s motion satisfies the applicable meet and confer
14 requirements.

15 5. Plaintiff’s Motion to Compel Discovery

16 Plaintiff’s Motion to Compel Discovery is without merit. The communication sought by
17 Plaintiff is not the subject of Plaintiff’s discovery request, which apparently requested only the
18 email from Steven Caputo to Thomas Ripa. *See* Dkt. 100, at 2. Moreover, it appears that the
19 redacted portions of the email produced by Mr. Ripa are properly subject to the attorney-client
20 privilege, as shown by HMS Defendants. *See Davis v. City of Seattle*, No. C06-1659Z, 2007 WL
21 4166154, at *3 (“attorney-client privilege extend[s] to communications with counsel made by all
22 employees ... concerning matters within the scope of their respective corporate duties, supplied
23 for the purpose of the corporation obtaining legal advice, and treated in a confidential manner”);
24 Dkt. 99, at 4 (The “communication between HMS Goblal in-house counsel Justin Walker and

1 Mr. Ripa is clearly privileged. Mr. Ripa was a witness to the alleged May 18, 2018 incident
2 while working within the scope of his duties as an HMS Ferries crewmember and provided
3 information to Mr. Walker to enable Mr. Walker to prepare HMS Global's defense to Plaintiff's
4 claims."). Additionally, to the extent Plaintiff seeks unredaction of Steven Caputo's cell phone
5 number in the email, that information is irrelevant and not at all at issue in this litigation.

6 Therefore, the Court should deny Plaintiff's Motion to Compel Discovery (Dkt. 85).

7 6. Work-Product Protection

8 Although Mr. Ripa had apparently previously claimed work-product protection (e.g., Dkt.
9 100, at 2), the response brief filed in opposition to the instant motion does not discuss or assert
10 work-product protection. *See* Dkt. 99. Regardless, the Court will deny Plaintiff's Motion to
11 Compel Discovery for the reasons discussed above and need not rule as to whether work-product
12 protections apply.

13 **III. ORDER**

14 Therefore, it is hereby **ORDERED that:**

- 15 • Plaintiff's Motion to Compel Discovery (Dkt. 85) is **DENIED**

16 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
17 to any party appearing *pro se* at said party's last known address.

18 Dated this 12th day of November, 2019.

19 

20 ROBERT J. BRYAN
21 United States District Judge